

Decision 02-05-027 May 16, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Reuben Bercovitch and Blanche Bercovitch,

Complainants,

vs.

San Diego Gas & Electric Company,

Defendant.

Case 98-11-027
(Filed November 9, 1998)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants Reuben Bercovitch and Blanche Bercovitch (Complainants) an award of \$34,154.10 from the Advocates Trust Fund (ATF) in compensation for their contribution to Decision (D.) 00-04-029.

1. Background

D.00-04-029 resolved a complaint against San Diego Gas & Electric Company (SDG&E) to restore, at SDG&E's expense, lines to Complainants' property that SDG&E removed. The central controversy is whether the lines were abandoned. This decision finds that SDG&E took inappropriate steps in deeming as abandoned the lines to Complainants' property. D.00-04-029 orders SDG&E to restore the lines that it removed.

2. Procedural History

On November 9, 1998, Complainants filed this complaint against SDG&E alleging that SDG&E terminated service without notice and requesting

restoration of service to the Bercovitch property at SDG&E's expense. A Prehearing Conference was held on February 25, 1999. Evidentiary hearings were held on June 30 and July 1, 1999. Opening and reply briefs were filed by the parties. The matter was submitted on September 16, 1999. On December 29, 1999, the Presiding Officer's Decision was mailed to the parties. On January 28, 2000, SDG&E timely filed an appeal. On February 11, 2000, Complainants timely filed a response. A final decision, D.00-04-029, resolving the complaint in favor of Complainants, was mailed on April 6, 2000.

Complainants filed a Request for Compensation From the Advocates Trust Fund (Request) on May 4, 2000. Complainants seek reimbursement of their legal fees and costs of prosecuting the complaint. No opposition to the Request was filed.

3. Requirements for Awards from ATF

The rules governing administration of the ATF and the criteria for granting awards from the ATF are set forth in the "Declaration of Trust" (Declaration) dated October 11, 1982. Prior to execution, this document was approved by the Commission in D.82-05-009 and D.82-08-059. The language of the executed Declaration was subsequently modified in D.92-03-090.

The Declaration, Section 1.2, provides that the ATF is created to defray expenses related to litigation of consumer interests in "quasi-judicial complaint cases." The instant complaint falls within this category. Because this threshold requirement is met, the Request will be evaluated to determine if it meets the criteria for an award.

The criteria to be considered in determining eligibility for an award are set forth in the Declaration, Sections 1.3 and 1.4. Section 1.3 provides that an award may be granted only where the private party has made a "direct, primary, and

substantial contribution" to the result of the case. Fees will be awarded where (1) complainants have generated a common fund that is not adequate to meet reasonable attorney or expert witness fees; (2) a substantial benefit has been conferred upon a party or members of an ascertainable class, but no means are available for charging those who benefited with the cost of obtaining the benefit; or (3) where complainants have acted as private attorney general in vindicating an important principle of statutory or constitutional law, but no other means or fund is available for award of fees.

Section 1.4 provides an award will be based upon consideration of four factors: (1) the societal importance of the public policy vindicated; (2) the necessity for private enforcement and the magnitude of the burden on the complainant; (3) the number of people standing to benefit from the decision; and (4) the magnitude of the party's own economic interest in the litigation. Fee recovery is allowed even if a party has an economic interest in the proceeding if the Commission finds good cause for an award.

3.1 Contribution to Resolution of Case

The Declaration, Section 1.3, provides that attorneys' fees may be awarded only where it is clearly and convincingly demonstrated that the private party has made a direct, primary, and substantial contribution to the result of the case. Complainants argue that as a result of their participation, the Commission stated conclusions of law in D.00-04-029 that clarify General Order (GO) 95, and that this clarification benefits all ratepayers. They further maintain that their participation resulted in the Commission's clarification of the standard and procedures to be utilized by an electric utility when contemplating the removal of utility infrastructure serving private property. Complainants provide citations to their testimony and positions that are reflected in the Commission's discussion

in D.00-04-029. Upon review of the decision, we concur with Complainants that their participation made a direct, primary, and substantial contribution to the decision. Without Complainants' initiation of the complaint case, the need to review and correct SDG&E's implementation of various rules contained in GO 95 would not have come to our attention. This fact, combined with the specific arguments raised by Complainants, constitute a substantial contribution to our final decision.

3.2 No Means of Charging Costs of Obtaining Benefit to Benefited Class

Section 1.3 provides three ways to demonstrate eligibility for an award. Complainants meet the second of these, which reads as follows: "Fees will be awarded from the ATF where a substantial benefit has been conferred upon a party or members of an ascertainable class, but no means are available for charging those benefited with the cost of obtaining the benefit..." As a result of Complainants' contributions in this proceeding, the Commission issued an order that applies and enforces GO 95 and rules contained therein. The Commission's order benefits all electric retepayers who have an interest in uninterrupted electric service. D.00-04-029 relates to the issue of when a utility may deem power lines to be abandoned by a customer, so that the utility may remove the power lines. The decision also clarifies that SDG&E Tariff Rule 15.I.1 does not confer upon SDG&E unfettered discretion to permanently abandon service to lines.

The wrongful removal of utility infrastructure serving Complainants' property illustrates the importance of enforcing the procedures that an electric utility should follow prior to removing infrastructure. It is important for electric utilities to understand the procedures that must be followed, and the

requirements of GO 95. It is also important for Commission staff to understand the same procedures and rules. D.00-04-029 serves to clarify these issues for both utilities and staff. This is a benefit that has been conferred upon an ascertainable class consisting of electric utility consumers. There is no means available for charging this class of beneficiaries with the cost of Complainants' litigation expenses.¹

3.3 Section 1.4 Requirements

The Declaration, Section 1.4 provides that an award will be based upon consideration of four factors. The first factor is the strength or societal importance of the public policy vindicated. In this case we apply and enforce the rules found in GO 95 pertaining to the obligation of an electric utility to maintain utility infrastructure in place unless certain procedures are followed to establish that utility infrastructure has in effect been abandoned. The importance of clarifying these procedures and rules is demonstrated by the facts of this case, where SDG&E wrongfully removed utility infrastructure serving Complainants. The public policy interest raised makes this case one in which compensation from the ATF is justified.

The second factor to be considered is the necessity of private enforcement and the magnitude of the burden on the Complainant. In this case private enforcement, initiated by Complainants, was necessary to bring to the

¹ We have previously concluded that a complainant acting solely in an individual capacity and seeking a personal remedy is not entitled to claim compensation as an intervenor pursuant to Pub. Util. Code § 1801–1808. (See D.98-04-059, pp. 22-23.) In this case Complainants participated in an individual capacity, and sought a personal remedy in the form of restoration of utility lines to their property. Thus they were not eligible to seek an award under the statutory intervenor compensation program.

attention of the Commission the fact that SDG&E erroneously interpreted its obligations under GO 95 and SDG&E Tariff Rule 15.I.1. We find the burden on Complainants of bearing the cost of litigation to be substantial and meritorious of reimbursement. While D.00-04-029 requires SDG&E to restore the electric line to Complainants' property, the decision does not make Complainants whole because they are required to bear the cost of litigation. Accordingly, an award of litigation costs from the ATF is appropriate.

The third factor to be considered is the number of people standing to benefit from the decision. The beneficiaries of this decision are all electric utility customers. The broad interest in the issues addressed by D.00-04-029 make it a case in which an award from the ATF is appropriate.

The final factor to be considered is the magnitude of a party's own interest in the litigation. An economic interest in the litigation is not a bar to an award, if the Commission finds good cause for granting an award. In this proceeding Complainants had no expectation of obtaining any economic advantage. The complaint was brought to require SDG&E to restore access to utility electric service. Complainants prevailed and we ordered SDG&E to restore lines to Complainants' property. However, unless an award from the ATF is granted, Complainants are not made whole; rather, they experience an economic disadvantage in the amount of their litigation costs. It is appropriate to grant an award of litigation expenses.

4. Reasonableness of Requested Compensation

Complainants request compensation in the amount of \$37,154.10 as follows:

Attorneys' Fees

Detisch & Christensen	(325.65 hours at \$97.88/hour)	=	\$31,876.11
Dershowitz & Eiger	(9.25 hours at \$375/hour)	=	\$ 3,000.00

Total Attorney Fees		=	\$34,876.11
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Additional Costs

Trial Exhibits	=	\$ 406.79
Postage & UPS	=	\$ 810.48
Fax & Phone	=	\$ 21.92
Photocopies	=	\$ 338.80
Transcripts	=	<u>\$ 700.00</u>
Total Costs	=	\$ 2,277.99
Total Compensation Requested	=	\$37,154.10

4.1 Hours Claimed

Complainants documented the claimed hours by presenting a daily breakdown of time expended by attorneys in the two law firms employed. Detailed information is provided regarding the tasks that were performed and the amount of time expended on each task. The hourly breakdown also indicates the attorney who performed each task and whether the attorney was a law firm partner or an associate attorney.

We have reviewed the bill of the law firm of Detisch & Christensen, for a total of 325.65 hours. We note that the number of hours claimed is high for a normal complaint case. However, the record indicates that this was a hotly contested proceeding. The proceeding spanned several years, during which time Complainants' attorneys were called upon to regularly engage in tasks related to the case. These tasks included attendance at a PHC, preparation of testimony, filing of a motion to exclude evidence, attendance at hearings, briefing, and a response to an appeal of the presiding officer's decision. In light of the voluminous record and the tasks performed, we find that the hours billed are reasonable and fully compensable.

We have reviewed the itemized bill of the law firm of Dershowitz & Eiger, for a total of 9.25 hours. We find that it is not reasonable to reimburse Complainants for any of these hours. It appears that this law firm was retained between the period of August 23, 1999 and September 16, 1999 to review the same documents that the law firm of Detisch & Christensen was reviewing and drafting at this time. Complainants have provided no justification for the necessity of having two law firms engaged in the review and preparation of the same materials. No filings were made by the law firm of Dershowitz & Eiger . We deny the request for compensation for the attorney fees billed by the second law firm, in the amount of \$3,000.00.

4.2 Hourly Rates

The hourly rate for work by both partners and associates at the law firm of Detisch & Christensen is billed at \$97.88. Complainants indicate that this is a discounted rate. We find this hourly rate to be reasonable and adopt it for the work of attorneys from this law firm. We note that a substantial amount of time was spent by partners from that law firm and that attorneys at the partner level generally demand fees greatly in excess of the amount requested. The rate sought in this proceeding is modestly higher than the \$85.00 per hour rate that we have granted to attorneys who passed the bar in 1997 for work performed in 1997 and 1998. (See, for example, D.00-04-003).

We do not consider the reasonableness of the hourly rate claimed for attorneys at the law firm of Dershowitz & Eiger because we have concluded that the time expended by them duplicates the efforts of the law firm of Detisch & Christensen and is therefore not compensable.

4.3 Other Costs

Complainants seek an award for itemized additional costs in the amount of \$2,277.99. The costs include postage and UPS, fax and telephone, trial exhibits, photocopying expenses, and transcripts. We find that Complainants have adequately itemized and explained these costs and that the costs are reasonable. We find it reasonable to grant Complainants' request for the recovery of these costs from the ATF.

5. Award

We award Complainants \$34,154.10 for their contribution to D.00-04-029. The award is calculated as follows:

Attorneys' Fees

Detisch & Christensen (325.65 hours at \$97.88/hour) = \$31,876.11

Total Attorneys' Fees = \$31,876.11

Additional Costs

Trial Exhibits = \$ 406.79

Postage & UPS = \$ 810.49

Fax & Phone = \$ 21.92

Photocopies = \$ 338.80

Transcripts = \$ 700.00

Total Costs = \$ 2,277.99

Total Compensation Award = \$34,154.10

As in all intervenor compensation decisions, we put Complainants on notice that the Commission staff may audit Complainants' records related to this award. Thus, Complainants must retain adequate accounting and other documentation to support their claim for an award from the ATF.

6. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. The arguments and information provided by Complainants pertain to issues that were central to the Commission's decisionmaking in Case 98-11-027.

2. Complainants made a direct, primary, and substantial contribution to D.00-04-029.

3. As a consequence of Complainants' participation, a substantial benefit has been conferred upon electric utility ratepayers.

4. Private enforcement of the issues litigated in this case was necessary to bring the issues to the attention of the Commission.

5. The burden to Complainants of funding their participation is substantial in light of the fact that they did not stand to receive any net economic advantage if they prevailed in this case.

6. The number of people standing to benefit from Complainants' participation is substantial.

7. The hours claimed by Complainants for work performed by the law firm of Detisch & Christensen are reasonable.

8. The hours claimed by Complainants for work performed by the law firm of Dershowitz & Eiger duplicates the efforts of the law firm of Detisch & Christensen, and therefore are unreasonable.

9. With the exception of the hours expended by attorneys at the law firm of Dershowitz & Eiger, the hours claimed are compensable at full hourly rates.

10. The hourly rate requested for the work of attorneys at the law firm of Detisch & Christensen is within the range of rates for work by experienced persons performing similar tasks in other Commission proceedings.

11. The miscellaneous other costs incurred by Complainants in this proceeding are reasonable.

Conclusions of Law

1. Complainants have fulfilled the requirements of the Declaration of Trust which governs awards of compensation from the ATF.

2. Complainants should be awarded \$34,154.10 for their contribution to D.00-04-029.

3. This order should be effective today, so that Complainants may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. Reuben Bercovitch and Blanche Bercovitch are awarded \$34,154.10 to be disbursed from the Advocates Trust Fund, in compensation for their substantial contribution to Decision 00-04-029.

2. This proceeding is closed.

This order is effective today.

Dated May 16, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY

Commissioners